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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1724~~ 70-182

LUCKENBACH OVERSEAS CORPORATION,

Petitioner,

v.

LOUIS OZGA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. WILSON,
Counsel for Petitioner,
116 John Street,
New York, N. Y. 10038.
COrtlandt 7-9600

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 18, 1971.

Opinions Below

There was no opinion by the District Court for the Southern District of New York. There was no opinion by the Court of Appeals for the Second Circuit.

Jurisdiction

Judgment of the Court of Appeals was entered on February 18, 1971 (R. 20). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Question Presented

Whether the District Court may ignore the clear mandate of Rule 26(d)(3)[1] of the Federal Rules of Civil Procedure and permit the attorney for a party to read at the trial a pre-trial deposition transcript of his client despite total lack of proof that the deposition was qualified under any of the provisions of Rule 26(d)(3) of the Federal Rules of Civil Procedure.

Rule Involved

The procedural provision involved was Rule 26(d)(3) of the Federal Rules of Civil Procedure, now Rule 32(a)(3).

Statement

Suit was brought by respondent seaman against petitioner in the District Court for the Southern District of New York under the Jones Act (Title 46 U. S. C. §688) and for unseaworthiness and the District Court had jurisdiction on those bases.

Respondent asserted in his complaint and on his deposition before trial a claim for illness in the nature of dysentery caused by drinking contaminated water that had been allegedly taken on board the S.S. "Lena Luckenbach", owned and operated by petitioner. Respondent's deposition was taken by petitioner on October 31, 1966 purely for discovery purposes and pursuant to a notice of deposition served with petitioner's answer, as is the practice of defendants in Jones Act cases, with a view

[1] Now rule 32 (a) (3), Federal Rules of Civil Procedure in identical language.

towards uncovering promptly the factual allegations of the seaman to permit preparation of a defense calculated to confront the seaman at the trial on cross-examination as well as to establish affirmative defensive material.

On October 28, 1968 respondent's attorney telephoned counsel for petitioner to advise that he had encountered difficulty in locating his client and that he would make formal application before Judge Tyler of the Southern District of New York for an order adjourning the trial indefinitely in order to permit him to locate his client. There was a hearing before Judge Tyler of that application that afternoon at which time petitioner moved for an order dismissing the complaint for failure to prosecute. The case had been on the Reserve No. 1 Calendar since September 1, 1968, on the Ready Calendar since October 1, 1968 and was on the pre-trial settlement conference calendar on October 18, 1968. Judge Tyler reserved decision on both motions and counsel were advised that the Court would consider the entire matter again when the case came up again, which Judge Tyler indicated would be the following week (10a).[2]

On October 31, 1968 both counsel were notified to appear and be ready for trial that afternoon before the Honorable Lloyd F. McMahon, District Judge. Attorneys for both sides appeared that afternoon at 2:15 P.M. in Judge McMahon's robing room, at which time respondent's attorney submitted an affidavit (9a) advising Judge McMahon of the motion pending before Judge Tyler. In that respect, Judge McMahon was advised that Judge Tyler had indicated three possible dispositions of the motion:

1. To mark the case off the calendar to be restored when the respondent was located;

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[2] Numerals followed by the letter "a" indicate pages in the appendix.

2. To adjourn the case;

3. To deny the application and require respondent to go to trial using only the examination before trial in lieu of live testimony of respondent.

In his application before Judge McMahon, respondent's attorney requested that the Court grant the first two of the above alternatives and not require respondent to go to trial at that time since the jury would have a difficult task in assessing credibility and the best interests of justice would be served by the adjournment (8a).

Judge McMahon was then advised of respondent's attorney's attempts to learn of the whereabouts of respondent (9a) which among other things showed that respondent's mailing address was Philadelphia (6a) and that respondent would eventually be reached through that address. A check of union halls throughout the country as well as Coast Guard records failed to show that respondent was at sea (9a). Judge McMahon then noted that the only excuse for an adjournment after the case had been sent out to trial would be the occurrence of an intervening and justifiable cause after the case had left the Part I or Calendar Part of the Court (10a). Respondent's attorney candidly admitted that there had been no supervening justification (10a). Judge McMahon then indicated that he would order the trial to proceed on the basis of respondent's pre-trial deposition. Counsel for petitioner moved to dismiss "for the plaintiff's failure to prosecute and be ready for trial in accordance with the local rules of the Court" (11a). Judge McMahon denied that motion and the case proceeded to trial over petitioner's objection with the deposition transcript of respondent being read to the jury.

The jury rendered a verdict in respondent's favor in the sum of $3,500 and Judge McMahon denied all post-verdict motions and the Court of Appeals for the Second Circuit affirmed without opinion.

Reasons for Granting the Writ

1. This Court should issue a judgment directing the District Courts to adhere to the clear wording of the Federal Rules of Civil Procedure because the Rules should not be brushed aside in the simple interest of expediting trials of suits in the District Court. A "tidy calendar" cannot properly be made the basis for a total disregard of the Rules of Civil Procedure that would, if extended, lead to a state of anarchy in the Courts. See *Welden* v. *Grace Lines, Inc.*, 404 F. 2d 76 (2 Cir. 1968).

Rule 26(d)(3), in effect at the time of trial, provided:

> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Rule 26 (d) (3) was explicit, and remains so as renumbered, and required that the deposition be excluded from the proceeding before the Court. Counsel for respondent presented before Judge McMahon only the hearsay statement of respondent's sister that "she thinks" he was on a ship bound for Viet Nam (9a) and a recital of his efforts

to locate Ozga at various union halls (9a). In his affidavit, counsel for respondent put Ozga's address in Philadelphia (6a) within 100 miles of New York. Respondent's attorney stated to Judge McMahon in admirable candor "I am unable to state at the present time * * * where he is at the present time" (9a). There was accordingly no competent qualification under Subrules 1, 2 and 3 of Rule 26 (d) (3). Subrule 4 obviously does not apply to a party.

Subrule 5 cannot support Judge McMahon's ruling since he found clearly that respondent's attorney had had means of securing an adjournment by application to the Calendar (Part I) Judge for removal of the case from the Trial Calendar (9a) during the two months (September and October 1968) that saw the case approach trial. The admission of counsel that he could not "state anything that has intervened in the meantime" (10a) after assignment of the case to trial was a clear concession that no "such *exceptional circumstances*" existed as to make it desirable "with due regard to the importance of presenting the testimony of witnesses in open court to allow the deposition to be used", F. R. P. Civ. P. 26 (d) (3), Subrule 5 (emphasis supplied).

In *Berke* v. *Lehigh Disposal Corp.*, 435 F. 2d 1073 (2 Cir. 1970) the Court of Appeals for the Second Circuit approved the principle that was later pressed fruitlessly before it by this petitioner with respect to Rule 26 (d)(3). In that case the plaintiff was in the courtroom during the trial but in an allegedly incompetent mental condition that prevented him from testifying. The District Court excluded his pre-trial deposition testimony and the Court of Appeals for the Second Circuit approved that ruling on the grounds, among others, that Berke's "Counsel offered no competent testimony to prove that Berke was incompetent to testify at the trial and, without such a foundation, Berke's deposition was inadmissible. Rule 32(a)(3) [formerly Rule 26(d)(3)], F. R. Civ. P." (435 F. 2d 1073, 1076). The *Berke* opinion of the Court of Appeals was

rendered on December 24, 1970 and was not known to counsel for petitioner during briefing and argument before the Court of Appeals for the Second Circuit. The decision of the Court of Appeals in *Berke* states the interpretation of the Rule that should have been followed on the appeal in this case.

The procedural background outlined above demonstrates a classic case of non-compliance with the requirements of Rule 26 (d) (3) and it was an abuse of discretion destructive of petitioner's rights to a fair trial for Judge McMahon arbitrarily to order the case to trial in the absence of respondent, thus depriving the jury of a chance to evaluate the credibility of the principal witness in the case under the test of cross-examination.

The procedure adopted by the District Court would be more defensible had the deposition been conducted on a basis other than one of pure discovery by the shipowner. Had respondent's attorney taken his client's deposition for preservation of his testimony and not been able to fulfill the requirements of Rule 26 (d) (3) so as to qualify the deposition for use at the trial, it would still have been an abuse of discretion for the District Court to order the transcript read, but there would not have been the further complicating factors that additionally disqualified this discovery deposition.

The defense attorney's posture on an examination before trial is radically different from his tactics on a non-discovery deposition or at the trial. On discovery examination he inquires rather blindly as to hearsay matters and seeks self-serving answers in the hopes that they may reveal other evidence. The principal and crucial omission from a discovery deposition transcript is the element of cross-examination. That method of eliciting truth has been called the "crucial test of credibility" by the Court of Appeals for the Second Circuit, *Arnstein* v. *Porter*, 154 F. 2d 464, 469-470 (2 Cir. 1946). Judge McMahon's ruling

that there had been adequate opportunity for cross-examination by petitioner during the deposition (11a) completely misconceived the nature of cross-examination as a means of testing a witness' probative quality by showing discrepancies between his pre-trial testimony and his trial testimony (obviously impossible here) and demonstrating his demeanor on the stand under pressure of oral cross-examination as indicative of his lack of candor and trustworthiness. See *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484 (2 Cir. 1952) where the Court of Appeals for the Second Circuit stressed the importance of permitting the fact finder to study the demeanor of witnesses, citing *American Tobacco Co.* v. *The Katingo Hadjipatera*, 194 F. 2d 449 (2 Cir. 1951).

The distinction between a discovery deposition and one taken for perpetuation of testimony has been noted by the 7th Circuit in *Hosie* v. *Chicago & North Western Railway Co.*, 282 F. 2d 639 (7 Cir. 1960) and by the District Court for Alaska in *Flynn* v. *Vevelstad*, 119 F. Supp. 93 (D. Alas. 1954) affd. 230 F. 2d 695 (9 Cir. 1956).

This Court should confirm that to force a party to trial on the discovery deposition of an inexcusably absent adversary is not only a violation of Rule 26 (d) (3), now Rule 32 (a) (3), of the Federal Rules of Civil Procedure, but also a perversion of orderly trial processes that deprives the litigant of the fundamental right of cross-examination and the jury of the right to view the demeanor of the missing witness.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

WILLIAM A. WILSON,
Counsel for Petitioner.

May 7, 1971

APPENDIX A

Federal Rule of Civil Procedure Involved

Rule 26 (d) (3) now Rule 32 (a) (3) (Following Title 28 United States Code Annotated):

> "The deposition of any witness whether or not a party may be used by any party for any purposes if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or, 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses in open court to allow the deposition to be used."

APPENDIX B

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Judgment #69,591

The issues in the above entitled action having been brought on regularly for trial before the Honorable Lloyd F. McMahon, United States District Judge and a jury, on October 31 and November 1, 1968, and the jury having returned a verdict in favor of the plaintiff and the Court having denied all motions, it is,

ORDERED, ADJUDGED and DECREED: That the Plaintiff Louis Ozga have judgment against the defendant Luckenbach Overseas Corp., in the sum of $3,500.00.

Dated: New York, N.Y.
November 4, 1968

John J. Olear, Jr.
Clerk

November 12, 1968

Costs taxed in favor of the plaintiff in the sum of $46.94 and added to Judgment.

John J. Olear, Jr.
Clerk.

APPENDIX C

Excerpts From Record

Affidavit of Paul C. Matthews, Jr.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York)
County of New York) ss.:

PAUL C. MATTHEWS, JR., being duly sworn, deposes and says:

I am an attorney-at-law associated with Paul C. Matthews, attorney for the plaintiff herein and make the following affidavit in support of a request for an adjournment in the above matter.

This is a seaman's action brought to recover damages for an illness suffered by the plaintiff on board the defendant's vessel and for aggravation of said illness by reason of the defendant's failure to render proper and adequate medical treatment to the plaintiff. The plaintiff became ill on the SS Lena Luckenbach following the consumption of water which had an unusually salty taste. Other crew members complained about this water and others were treated for gastro-intestinal complaints. The plaintiff who had had a prior history of intestinal disorders suffered a severe illness, and although he was treated by doctors at various foreign ports, he was kept on board the ship and required to continue working, with the exception of a few days in the ship's hospital, until the vessel arrived back in the United States in January of 1965. At that time plaintiff had been ill for approximately six weeks and had such severe diarrhea that he had lost 15 to 20 pounds and at times had to wear a Kotex pad because of his inability to

control himself. He was admitted to the U. S. Public Health Service Hospital, Staten Island, on January 25, 1965. At that time he had a temperature of 102°. He remained under treatment until June 2, 1965, at which time he was marked fit for duty.

Plaintiff was last in my office in May of this year. At that time I advised him that according to the present state of the calendar and the rate at which it was moving that his case would probably be reached for trial around December or January. Plaintiff's address is care of his sister, Mrs. Rose Fitzgerald, 31-29 Tulip St., Phila., Pa. On Oct. 16, 1968 this case was called for conference before the Hon. Milton Pollack in Part I of this Court. Judge Pollack recommended settlement in the amount of $1,500. Your deponent was agreeable to this recommendation but defendant indicated that they were not willing to make any offer of settlement but insisted upon trial of the case. On Oct. 3 or 4, 1968 your deponent had received a letter from the attorneys for the defendant requesting a physical examination. This was the first time that such an examination had been requested, although defendant's attorneys had indicated previously that they might request one. On Oct. 7 your deponent wrote to the plaintiff at 31-29 Tulip St., Philadelphia. No reply has been received from that letter. On October 24 your deponent telephoned Mrs. Fitzgerald and was advised that so far as she knew her brother, the plaintiff, was probably at sea and probably on the Vietnam run. However, she could not state the name of any ship and could not state positively that the plaintiff was at sea. On Oct. 24 your deponent wrote to the Commandant (MVP-1), United States Coast Guard, requesting Coast Guard information as to whether the plaintiff was presently on board a ship. Not having received an answer to that letter by Oct. 28, your deponent telephoned the Commandant and spoke with a Mrs. Johnson. I was advised that the Coast Guard maintains records where men are on foreign voyages

Appendix C

Affidavit of Paul C. Matthews, Jr.

but that these records are about one month behind. As of Oct. 28 she had no record of Mr. Ozga being on board a vessel. To date no reply has been received from the Commandant to my letter of Oct. 24.

Your deponent has also instituted inquiries through the various union halls throughout the country, both by letter and by telephone and has been unable to locate the plaintiff. This means that the plaintiff is not in any of the halls and is not currently registered for shipping.

Because it will be necessary to prove that the plaintiff's illness could have been caused by contamination of the fresh water, your deponent has designated in his pretrial memorandum Dr. Stanley Reichman. I telephoned Dr. Reichman's office this morning and was advised that he is out of town and will not be back until Monday.

There is one witness who is familiar with the complaints made on the vessel concerning the water. His name is Maurice Jones and he resides in Hitchcock, Texas. I have spoken with Mr. Jones on the telephone within the last week. I tried to reach him this morning and there was no answer on his telephone.

On Oct. 23 your deponent received a letter from the defendant in the form of an amended pretrial memorandum listing as additional witnesses: W. Reinhart, R. G. Naggiar and P. A. Donohue. Your deponent recognizes the first two names as being men in charge of claims for Maritime Overseas Corp. and it is assumed that their testimony will relate to the presence or absence of other complaints on the vessel. This very information has been demanded by the plaintiff as discovery but has not been furnished. In order to expedite the actual trial time of this case, it is requested that the Court order the defendant to permit me to inspect all illness records from the vessel for this trip so that the cross-examination of these witnesses will not be unduly prolonged.

Appendix C

Affidavit of Paul C. Matthews, Jr.

On Oct. 28 your deponent appeared before the Hon. Harold Tyler, U.S.D.J., and made an application for adjournment of the above matter explaining to Judge Tyler such of the circumstances outlined above as were known to me on that date. Judge Tyler reserved decision on the motion but indicated that there were three alternatives available to him:

(i) to mark the case off the calendar to be restored when the plaintiff is located;

(ii) to adjourn the case;

(iii) to deny the application and require the plaintiff to go to trial using only the examination before trial in lieu of live testimony of the plaintiff.

His Honor requested that your deponent check further to try to locate Mr. Ozga which has been done without success. I have also checked with the post office at the Seaman's Church Institute where Mr. Ozga sometimes receives mail. The clerk there advised me that he knows Mr. Ozga and that he has not seen him since approximately May of this year.

It is respectfully requested that the Court in the exercise of its discretion grant either of the first two alternatives suggested by Judge Tyler and that the plaintiff be not required to go to trial at the present time. As the Court is well aware it is most difficult for a jury to assess the credibility of a plaintiff without having had the opportunity to see him. The defendant, in fact, raised this very point and indicated that they would object to the introduction of the plaintiff's deposition which they had taken on that very grounds.

It is respectfully submitted that the interests of justice would best be served by granting the relief requested.

Paul C. Matthews, Jr.

(Sworn to October 31, 1968.)

Appendix C

Excerpts from Testimony

(2) (In the robing room.)

The Court: Who is it that has the application?

Mr. Matthews: I do, your Honor.

Has your Honor had a chance to read the papers?

The Court: Yes, but I will hear you on the record.

Mr. Matthews: Your Honor, the plaintiff has made efforts as outlined in my affidavit. If you wish me to state them for the record, I will do so.

The Court: You are the one that is making a record of something.

Mr. Matthews: Surely, your Honor.

Counsel for plaintiff has made efforts to locate the plaintiff. I have spoken with his sister-in-law in Philadelphia who does not know of his whereabouts at the present time. I have checked with each of the National Maritime Union halls where he is not registered. I have communicated with the United States Coast Guard and I am unable to state at the present time to this court as to where the plaintiff is at the present time.

According to his sister he is on a ship, (3) she thinks, bound for Vietnam. She does not know the name of the ship. I cannot give your Honor more particular information along those lines.

The Court: Did you apply before the case was assigned for trial to the judge in 128 to take the case off the trial calendar?

Mr. Matthews: I did not, your Honor.

The Court: Did you know the whereabouts of your client then?

Mr. Matthews: No, your Honor. I wrote at that time and I have mentioned in my affidavit I wrote on October 7th. This case was on October 16th, if I am correct in stating the date, your Honor, before Judge Pollack.

Appendix C

Excerpts from Testimony

The Court: Before that, before it is assigned out, the rules of the court require that you go to the judge in the calendar part in 128—the case is on the ready calendar as this one had been for many, many months—and have it removed from the ready calendar before it is assigned out to trial.

The only excuse that is acceptable once the case is assigned out to trial is something that has intervened. Is there any intervening excuse here?

Mr. Matthews: Your Honor, I cannot state (4) anything that has intervened in the meantime.

If I might, your Honor, just so that your Honor would be aware of the circumstances, I made an application on Monday before Judge Tyler. I had been on trial the entire previous week before Judge Croake, and on Monday I made an application before Judge Tyler, and Mr. Nolan and Mr. Wilson were both here at that time.

His Honor, Judge Tyler, reserved decision on the application and indicated three possible dispositions which I have set forth in my affidavit: one was to have the case marked off the calendar subject to restoration; and the second was to grant an adjournment; and the third was to require the plaintiff to go forward even in the absence of the plaintiff personally.

The Court: Have you the depositions of the plaintiff that we can take?

Mr. Nolan: Defendant examined plaintiff by discovery deposition in October of 1966, your Honor.

The Court: We will proceed, then, without the plaintiff.

Mr. Matthews: I just would like to state for (5) your Honor's benefit that at that time I had a non-jury case, which was assigned to Judge Tyler, and Judge Tyler indicated that he would reserve decision on the application, that I would go ahead with the non-jury case and see if I could develop any further information as to the whereabouts of

Appendix C

Excerpts from Testimony

the plaintiff. The non-jury case was assigned out to Judge Lasker and was tried yesterday.

The Court: I am sorry, we have got to proceed.

Mr. Nolan: May defendant express its position?

The Court: We cannot postpone everything for a hundred years.

Mr. Nolan: Your Honor, may defendant express its position?

The Court: Yes?

Mr. Nolan: Your Honor, we feel that the deposition that was taken of plaintiff was a discovery deposition and led us to many avenues of impeachable evidence, and we feel that now for the plaintiff to be kept away from court for reasons that have not been expressed, except that they do not know where the plaintiff is, would prevent us from cross-examining the plaintiff.

(6) The Court: You have had your opportunity in a deposition, full opportunity. If you do not take advantage of it you cannot hold that. We cannot delay the business of this court. This court is in a crisis condition. It has over 11,000 civil cases pending, not to mention over a thousand criminal cases. We cannot delay these cases for trial. They have been hanging here. This case is a 1966 filing for an accident that happened when?

Mr. Matthews: Illness occurred in 1964, November or December of that year, your Honor.

The Court: November or December of 1964. It just is not in the interests of justice to delay this case any longer. It should have been tried years ago.

Mr. Nolan: Your Honor, defendant is not requesting that the matter be adjourned. We have moved before Judge Tyler to dismiss for the plaintiff's failure to prosecute and be ready for trial in accordance with the local rules of the court.

Appendix C

Excerpts from Testimony

The Court: I deny that motion. You have had his deposition; we will go on that. We have got a jury panel waiting.

* * *